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Condo Cases across Canada

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It is my pleasure to provide these brief summaries of recent condominium court decisions across Canada. I don't provide summaries of every decision rendered. I select a handful of decisions that I hope readers will find interesting. I hope readers enjoy this regular column of the CCI Review.

THE HOT TOPIC:

DIRECTORS AND OFFICERS LIABILITY INSURANCE

This topic was mentioned in Condo Cases Across Canada, Part 15 (August 2006). At that time, I pointed out that D&O insurance generally will not cover a claim if the potential for the claim was known before the commencement of the insurance policy. This is one of the important principles discussed in the case of *Boland v. Allianz Insurance Company of Canada.*

The good news is that the Court of Appeal (in the *Boland* case) has confirmed that the "effective date of the policy" for these purposes is the commencement of the very first policy (if the insurer has provided continuous coverage by means of a series of policies).

In any event, I recommend the following cautionary practice:
If you know of a potential D&O claim, it may be best (if possible) not to change D&O insurers.

ONTARIO CASE

Boland v. Allianz Insurance Company of Canada (Ontario Court of Appeal) (July 30, 2008)

Appeal allowed. D&O insurer obligated to defend director

A condominium corporation brought a claim against a former director for alleged wrongful acts. The director then sought the protection of the corporation's directors and officers liability insurance policy. The lower court held that there was no coverage for the particular claim under the D&O Insurance Policy. [See Condo Cases Across Canada, Part 15, August 2006.]

The director appealed to the Ontario Court of Appeal, and was successful. The Court of Appeal overturned the lower Court decision and held that the insurer has a duty to defend in this case. The Court of Appeal's reasons were as follows:

- The insurer provided continuous coverage by means of a series of one-year policies. In such cases, the "effective date of the policy" is the commencement of the very first policy in the series. At that time (1994) the director did not have "knowledge of and could not reasonably foresee any circumstance that might result in a claim". Therefore, the director did not have knowledge of the potential claim before the effective date of the policy.
- "Although the force of the claim is for deliberate conduct, there is an alternative and independent claim that the appellant acted negligently". The "deliberate conduct" claim is not covered under the D&O policy. The negligence claim may have lacked particulars. Nevertheless, it was sufficient to trigger the insurer's duty to defend.

NEW BRUNSWICK CASE

ARC Accounts Recovery Corporation v. Westmorland Condominium Corporation No. 48 (Queen's Bench of New Brunswick) (July 18, 2008)

Owner not prevented from using designated visitors parking area

The condominium contains 28 residential

units and 2 commercial units. The 2 commercial units are owned by ARC. Each of the 28 residential units has a designated indoor parking space. The 2 commercial units have no such designated parking spaces. The manager of ARC had been using a parking space located in a surface parking area (which is part of the common elements). The condominium corporation prepared and circulated a Homeowners' Guide which included the following statement:

"The outside parking area is strictly for visitors and for short term use of guests of the residents."

At the corporation's AGM held on December 2, 2003, a motion was also passed to approve the Homeowners' Guide. ARC then applied to Court for a determination of the following question: Did the Homeowners' Guide prevent ARC from continuing to use the outside parking area? The Court's answer was "no". The Court said that the condominium corporation had not established any "valid basis, at this time, for restricting ARC's use of the visitor parking area". The Court accordingly made the following ruling:

"ARC is therefore entitled to a declaration that at present its manager's right to park a passenger type automobile in what has been labeled as the visitor parking area located in the common elements of the condominium property cannot be restricted or hindered by (the condominium corporation) on the basis of its Declaration, By-laws or Rules and Regulations as presently constituted."

[Editorial Comment: The case does not contain any reference to the Site Plan or to the Zoning By-law or any other municipal parking regulations (which might require that the outside parking spaces be set aside for visitors). Therefore, I assume that no such "municipal restrictions" applied in this case.]

ONTARIO CASES

Metropolitan Toronto Condominium Corporation No. 932 v. Larhrkamp (Ontario Superior Court of Justice) (April 28, 2008)

Owner restrained due to owner's harassment of management staff and a member of the Board

The owner, Lahrkamp, opposed the Board's decision to renovate the lobby in order to accommodate access for disabled persons, the elderly and people with packages or bulky items. The owner's objection developed into a series of demands for documentation and information, complaints about the resulting responses, and confrontations with the management and administration of the condominium.

After reviewing the evidence, the Court's conclusions were as follows:

"The evidence does not establish that it is necessary to order a broad injunction against the respondent. The respondent is entitled to express his opinion about the Board of Directors and the lobby renovation. There is no basis to order the dismantling of the respondent's website. However, in my view, the respondent's conduct to the staff of the management office and to a member of the Board of Directors amounts to harassment. The *Condominium Act* gives the respondent the right to examine the records of the corporation. He is not entitled to abuse that right by conducting a campaign by siege against the management office and directors. Banging on the management door on several occasions, blocking the door where the staff person was working and positioning his car to impede a director from proceeding are examples of conduct which are harassing. There are a number of remedies available to the respondent under the *Condominium Act* including calling a meeting of owners, removing directors and suing for oppression. Harassment is not one of them. When the respondent has been asked to desist by counsel, he has not done so. He has made it clear that short of a court order he will not stop his harassment. A staff person or director should not have to feel intimidated and harassed by the respondent."

The Court accordingly ordered that Mr. Lahrkamp be restrained from communicating with any employee of the management office or member of the Board of Directors, other than in writing. He was also restrained from entering or coming within 25 feet of the management office. And he was required to make any request for records in writing. He was also ordered not to persist in making more than one request with respect to the same record. In addition, documents would be produced to him only after he had paid the photocopying charges in advance.

Toronto Standard Condominium Corporation No. 1703 v. 1 King West Inc. etc. (Ontario Court of Appeal) (June 13, 2008)

Appeal dismissed – condominium corporation did not have authority to assert certain claims

The lower Court Judge struck out several paragraphs of the statement of claim (alleging that the developer had failed to comply with the ruling of the Ontario Securities Commission relating to the sales of the units) on the ground that the condominium corporation did not have authority under Section 23 of the *Condominium Act* to assert such claims. [See Condo Cases Across Canada, Part 21, February 2008.]

The condominium corporation appealed to the Ontario Court of Appeal. The Appeal was dismissed and the lower Court decision was upheld.

York Condominium Corporation No. 414 v. Unit Owners and Mortgagees of York No. 14 (Ontario Superior Court of Justice) (October 7, 2008)

No meeting of the unit owners pending application to appoint administrator

The condominium corporation applied for an order restraining the holding of a requisitioned meeting of the owners until the application for the appointment of an administrator had been dealt with. The Court granted the application. The Court said that the situation at the condominium corporation was "grave". The Court noted that there is a history of discord among various factions of the unit owners. The Court concluded that consideration of the appointment of an administrator is a genuine and serious issue for the unit owners in the condominium. The Court said that the requisitioned meeting to elect a new Board of Directors "would serve to increase the existing instability and in all likelihood inflame the situation". The Court therefore granted the injunction to prevent the meeting from proceeding. The Court said:

"I am satisfied that the moving party has met the 3 prong test which has been articulated by the Supreme Court of

Canada for the granting of an injunction: there is a serious question to be tried; there will be irreparable harm if the injunction is not granted; and the balance of convenience favours the granting of an injunction."

MANITOBA CASE

Olschewski v. 520 Portage Avenue Ltd. (Manitoba Court of Appeal) (September 10, 2008)

Appeal dismissed – trial Court properly determined square footage of unit

The trial Court ordered a reduction of the purchase price to reflect the actual area of the unit (1,500 square feet) as compared to the area stated in the listing agreement (1,823 square feet). The plaintiff appealed and the defendant cross-appealed.

All appeals were dismissed and the trial Judge's decision was upheld. The Court said that, in concluding that the actual area of the unit was 1,500 square feet, the trial Judge had not made any error of law or any palpable and overriding error of fact or of mixed fact and law.

The Appeal Court also noted that there is confusion and debate in the condominium industry with respect to the calculation of square footage in that there is more than one method of calculation used in the industry. According to the Court, this confusion could be greatly reduced if the *Condominium Act* specified how unit boundaries in a condominium are to be determined, and the guidelines of the Winnipeg Real Estate Board were clearer about determining the actual living area of a condominium.

B.C. CASES

Bea v. Strata Plan LMS 2138 (British Columbia Supreme Court) (August 22, 2008)

Strata corporation properly assigned parking spaces by by-law

The strata corporation passed a by-law to assign specific parking spaces in its parking lot to specific owners. One owner objected to the by-law and sought to return to the original parking state (namely, no parking restrictions).

The Court upheld the by-law. The court said that the by-law fell squarely within the authority of the strata Council to manage and maintain the common property for the benefit of the owners. The Court also said that there was no evidence of oppression or bad faith. The Court said that "the actions of the strata corporation were conducted… in the best interest of all of the owners, i.e. to achieve the greatest good for the greatest number".

Kaufmann v. Strata Corporation Plan 770 (Supreme Court of British Columbia) (May 20, 2008)

Common element modifications subject to municipal approval

The Kaufmanns own Unit #8 in the strata corporation. Prior to the Kaufmanns purchasing the unit, unauthorized alterations were made to the attic (common area). [The modifications comprised: A full bedroom/bathroom, a walk-in closet and a small child's bedroom.]

At a previous Hearing, the parties resolved the dispute, and the terms of the resolution were embodied in a Court order. The resolution contemplated that the areas in question would be leased to the Kaufmanns, with rental payments based upon a particular formula. This arrangement, however, was all conditional upon the modifications receiving appropriate approval from the municipality, including retroactive building permits. It was subsequently discovered that this would require rezoning of the building. The rezoning application would require cooperation of the strata corporation and perhaps also upgrades to the building as a whole.

The Kaufmanns made application to amend the previous order, to require the strata corporation's cooperation in the municipal application process. The Court refused to grant such an order. The Court said: "I am not persuaded that the order sought by the Kauffmans is warranted. The rezoning sought is well out of proportion to my original order." "There is a significant disparity in the costs of the strata corporation relative to the benefit to what the Kaufmanns seek, particularly as there is some uncertainty with respect to the rezoning being successful in any event."

Wiener v. Strata Corporation KAS 1354 (Supreme Court of British Columbia) (April 10, 2008)

Garage conversions contravene by-law. Administrator appointed

The petitioner was the owner of a unit in the strata development. Among other things, the petitioner sought a declaration that garage conversions contravened the by-laws of the strata corporation, that certain common area modifications also contravened the by-laws of the strata corporation, and that the strata council had failed to fulfill its obligations with regard to enforcement of by-laws. Finally the petitioner sought the appointment of an administrator to perform various duties of the strata corporation. Although the Court felt that some of the petitioners' complaints were "trivial", the Court generally agreed with the petitioner and granted the following relief:

- a declaration that the garage conversions contravened the by-laws of the strata corporation;
- a declaration that certain common area modifications also contravened the by-laws of the strata corporation;
- a declaration that the strata Council had, in some respects, failed to fulfill its obligations; and
- an order appointing an administrator on terms listed in the Court decision.

QUEBEC CASE

Syndicat des copropriétaires de l'Usine Mont-Royal c. 9119-7129-Québec Inc. (Quebec Superior Court) (October 16, 2008)

Earlier settlement did not prevent new claim respecting new defects

The syndicat brought a first action related to various building deficiencies. That action was settled and a release executed by the syndicat covering "all claims now or in the future in connection with any matters relating to the facts alleged" in the first action. The syndicat then brought a second claim with respect to other defects. The Court said that the settlement of the first claim did not prevent the second claim, particularly in light of the fact that the syndicat did not know about any of the defects in the second claim at the time of the settlement of the first claim.

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